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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

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No. 188

W. J. DILLNER TRANSFER COMPANY, ET AL.,
Appellants

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees

On Appeal from the United States District Court for the Western District of Pennsylvania

MOTION ~~OF INTERVENORS~~ TO AFFIRM

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Pursuant to Rule 16, paragraph 1(e) of the Revised Rules of this Court, B & P Motor Express, Inc., Continental Transportation Lines, Inc., Deioma Trucking Company, Detroit-Pittsburgh Motor Freight, Inc., Eazor Express, Inc., Helm's Express, Inc., Standard Motor Freight, Inc., The Glenn Cartage Company, The Lake Shore Motor Freight Company, The Regular Common Carrier Conference of the American Trucking Associations, Inc., Sentle Trucking Corporation, The Service Transport Co., and Wenham Transportation, Inc., intervening defendant-appellees, move to affirm the judgment of the United States District Court for the Western District of Pennsylvania on the ground that the questions

raised by appellants are so unsubstantial as not to warrant further argument.

STATEMENT

These intervenors were authorized by the District Court to intervene as parties,[1] filed their brief and participated in oral argument, and appear here in support of the position of the United States of America and the Interstate Commerce Commission in this proceeding. The intervenors consist of twelve general commodity motor common carriers of property operating in interstate commerce pursuant to authority issued by the defendant Commission, and one association of some two thousand motor common carrier members. Because the interpretation sought by appellant W. J. Dillner Transfer Company, if approved, would greatly expand its operation, and therefore its competition and the competition of numerous other carriers with similar authority, the interest of these intervenors in the outcome of this controversy is indeed substantial.

The W. J. Dillner Transfer Company by petition to the Commission sought a declaratory judgment clarifying its authority to transport heavy commodities in interstate commerce. The Commission, acting thereon, instituted an investigation to determine what commodities Dillner may lawfully transport and whether said Dillner has been and is engaged in transporting commodities not within the scope of its authority (J.S. 73-74).

Dillner's certificate authorizes, inter alia, transportation of "such commodities which because of their weight and size require special equipment." After a hearing,[2] the

[1] Names initially omitted from the caption in the judgment of the court below but added by order of the court, dated May 31, 1961, upon motion of intervenors to correct clerical error of omission.

[2] Other dockets not here important were considered at the same time.

filing of briefs and other pleadings, and oral argument before the entire Commission, the report assailed was issued. It reasserted the principle[3] that it is the size and weight of the individual commodities themselves and their inherent nature, rather than the size and weight of the aggregated bundles or packages thereof, that determines whether the special equipment of the heavy hauler is required (J.S. 56, 66). While agreeing in part with appellant Dillner and in part with the Examiner, the Commission differed, also, in part, and concluded that Dillner's transportation of certain bundled articles of iron and steel and palletized firebrick is outside that carrier's certificated authority (J.S. 62, 64).

The Commission denied petitions for reconsideration. (J.S. 76-85). Upon complaint filed, and hearing by the statutory district court, the latter sustained the Commission's report and order and dismissed the complaint (J.S. 14-25). *W. J. Dillner Transfer Company* v. *I.C.C.*, 193 F. Supp. 823 (W.D. Pa. 1961).

ARGUMENT

This Court is requested by appellants to review an order of the Interstate Commerce Commission involving that Commission's construction of certain motor carrier operating authority issued to appellant Dillner by said Commission. The assailed finding of the Commission was that Dillner was engaged in the transportation of "steel channels, plates, sheets, bars, rods, pipe, coils, rolling-mill rolls, and firebrick, in bundles or packages or fastened on skids; that such commodities are not required by their inherent nature to be aggregated in quantities of such size and weight that they are incapable of being

[3] Already well established in such cases as *Johnson Common Carrier Application*, 61 M.C.C. 783, 792 (1953); *L. C. Jones Trucking Co., Extension—The Dakotas*, 62 M.C.C. 539, 541 (1954); *Aero Trucking, Inc., Extension—Pipe*, 83 M.C.C. 97, 101 (1960).

loaded and unloaded manually; and that such commodities are not commodities which because of their weight or size require special equipment . . ." and that such transportation has been in violation of appellant Dillner's certificate (J.S. 67).

The basic question in the court below, and as properly seen by that court (J.S. 17-18) was "whether the Commission erroneously, arbitrarily or capriciously interpreted the certificate of the Dillner Company as conferring no rights to transport certain bundled articles of iron and steel and palletized firebrick." That the question before the Commission was one of certificate interpretation is seen both in its opinion (J.S. 26-72) and in its order setting the investigation. (J.S. 73-74).

The Commission's report dealt at length with a number of decisions, including *Black—Investigation of Operations*, 64 M.C.C. 433 (1955), wherein the Commission has consistently held that mere aggregation of units of a commodity does not bring the transportation thereof into the heavy hauling field (J.S. 54).

The burden on appellant here, and in the court below, was to demonstrate that the order of the Commission was clearly erroneous. Clearly, the Commission is empowered to interpret certificates and permits issued by it. *Adirondack Transit Lines* v. *United States*, 59 F. Supp. 503 (1944); affirmed, 324 U. S. 824. Further, this Court in *Andrew G. Nelson, Inc.* v. *United States*, 355 U. S. 554 (1957) stated that "a subsequent construction of the 'grandfather' permit by the Commission is controlling on the courts unless clearly erroneous." (P. 558).

Speaking of the appellant's burden, the court below said:

> ". . . We do not feel that Dillner has met the burden imposed by law. It is not our function to set aside the report merely because we might or might not

> differ with the Commission. We must act when we find that the report and order is not supported by substantial evidence. The burden is upon Dillner to prove this to the Court. It has not met this burden of proof, and, therefore, an appropriate order will be entered dismissing the complaint." (J.S. 24)

If it be appellant's position, as its Jurisdictional Statement seems to suggest, that it is being denied "grandfather" rights to which it might have been entitled, the *Nelson* case, supra, (P. 561, 562) speaks to the point in saying that "the carrier's recourse is to petition the Commission to reopen the grandfather proceeding for consideration of the evidence not previously brought to the Commission's attention."

In reaching their respective conclusions both the Commission (J.S. 39) and the lower court considered all of appellant's heavy hauler authority (J.S. 15). Dillner has identified no authority relevant to the issues before the Commission which either the Commission or the court refused to consider.

The appellants urge that the court and the Commission ignored and disregarded the findings of the hearing examiner who presided at the hearing. That the Commission gave recognition to the examiner's findings and likewise made adequate findings of its own is seen in its report wherein it adopted those findings in large measure and, in fact, carefully discussed and evaluated the examiner's views (J.S. 31, 63-67). After adopting in substantial degree the examiner's conclusions respecting Dillner's commodity authority, and taking a different view on a limited group of commodities, the Commission said, "Except to the limited extent indicated above, we agree with the conclusions of the examiner. . . . (J.S. 64-65).

Discussing the different treatment accorded by the examiner and the Commission to the alleged right of

Dillner to haul firebrick, the court below, speaking of the Commission's report, said:

> ". . . The decision of the Commission which denied Dillner the right to transport this firebrick demanded careful scrutiny by the Court . . . a careful reading of the testimony shows their final conclusion to be based on substantial evidence . . . It was more than a mere scintilla of evidence in support of the Commission's finding."

After carefully considering the variance between the respective treatment accorded the several commodities by the examiner and by the Commission, the court summarized the situation in these words:

> ". . . It would appear that their main difference was in determining which overall products were aggregated due to their inherent nature and which overall products were aggregated for economy purposes. The Commission set forth in its report wherein it differed with its examiner . . . and that is all it is required to do. We might point out that the difference here did not go to the credibility of witnesses in a situation in which the examiner's opinion ought to be given considerable weight but rather its interpretation and meaning of terms and the Commission's decisions in those cases are for the Commission rather than for the Examiner in the final instance. And, of course, there is no rule that holds that the Commission may not differ from its hearing examiner. See *Zinett* [*Sinett*] v. *United States*, 136 F. Supp. 37." (J.S. 23-24).

It is suggested (J.S. 3, 11) that the Commission has deprived the shipping public of the right of determining the manner and form of preparing goods for shipment. It should suffice that nowhere in the Commission's assailed report and order can there be found language restricting and impairing the rights of the shipping public to adopt any means it may seek to package and ship its goods. Moreover, none of the shipping public is here before the Court making such allegation. The Commis-

sion's position is simply that the discharge of the shipper's functions is not to be used to determine what interpretation should be given to a certificate issued by the Commission, nor to enlarge its scope. The Commission has the primary duty to interpret its certificates. "It appears clear that interpretation of federal certificates of this character should be made in the first instance by the authority issuing the certificate and upon whom the Congress has placed the responsibility of action." *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171, 177 (1959). Moreover, such an interpretation once made, is entitled to stand unless clearly wrong or arbitrary. *United States* v. *Interstate Commerce Commission*, 189 F. 2d 816 (1951).

There is here a large economic issue important to general commodity carriers and embraced within the Commission's duties under the National Transportation Policy, 49 U.S.C., preceding § 1, 54 Stat. 899. The court observed this issue when it saw that to accept a different view of the rights of heavy haulers might put them into "the hauling of china cups or wooden nutmegs." (J.S. 22). Although appellants did not press the point in the court below their transportation objective before the Commission was to expand their commodity coverage by an ultra liberal interpretation of their certificate description, "commodities which because of their weight and size require special equipment." In recent years technological advancement has produced labor saving devices such as power driven "fork lifts" which lift and load palletized aggregations of almost innumerable commodities, light as well as heavy in their individual capacity. To adopt a view contrary to that taken by the Commission, and sustained by the court below, so as to allow appellants, relying upon technology and not upon their certificates, to handle palletized firebrick, or bundles of bars, rods, steel channels, and similar items, would open the door to endless expansion of heavy hauler authority. Such a

result would correspondingly and inevitably erode the traffic of the general commodity carrier and impair that stability of the nation's transportation system which the Commission by the National Transportation Policy is enjoined by Congress to promote.

While the real issue before the court below was whether the Commission, in interpreting Dillner's certificate acted erroneously, arbitrarily or capriciously and without substantial evidence, that issue is not here raised by appellants, or, at least, not developed. The issues which are raised are purely incidental and ancillary. Their resolution does not warrant the full consideration of this Court.

CONCLUSION

We submit that the decision below is clearly correct in upholding the order of the Interstate Commerce Commission. It is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. The judgment of the district court should be affirmed.

Respectfully submitted,

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